

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Inquiry Concerning High-Speed Access to the)
Internet Over Cable and Other Facilities)

GN Docket No. 00-185

Appropriate Regulatory Treatment for)
Broadband Access to the Internet Over)
Cable Facilities)

CS Docket No. 02-52

REPLY COMMENTS OF THE CITY OF BOSTON

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August 6, 2002

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SUMMARY

The City of Boston hereby submits a letter from the Honorable Thomas M. Menino, Mayor of the City of Boston, President of the United States Conference of Mayors, and member of the Federal Communications Commission's Local State Government Advisory Committee, as its Reply Comments in the matter of *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Order and Notice of Proposed Rulemaking in GN Docket No. 00-185 and CS Docket No. 02-52, FCC 02-77 (rel. March 15, 2002) (the "NPRM").

The City of Boston is a member of the Alliance of Local Organizations Against Preemption ("ALOAP") and fully supports the comments and reply comments filed by ALOAP. However, unlike many other local governments, the City of Boston has voluntarily agreed not to collect cable franchise fees on gross revenues received from the provision of cable modem service by franchised cable operators using and occupying the public rights-of-way of the City, and therefore contributes a unique perspective to this proceeding.

Mayor Menino calls the Commission's attention to the potentially devastating consequences of the tentative conclusions in the NPRM on deployment of broadband services to all Americans. The exercise of local franchise authority – specifically the authority of local governments to require that cable modem facilities be extended to all neighborhoods within a franchise area – has ensured that broadband services are deployed to the greatest number of Americans. If cable modem service is declared to be neither a cable nor a telecommunications service, nor a service upon for which a franchise may be required, there will be no regulatory means of ensuring that deployment of broadband reaches every home in America.

The Mayor disputes comments filed by cable and telecommunications operators and Internet service providers stating that reliance on the market alone will ensure deployment without local regulation. He also disputes industry arguments that local regulation has no role to play in promoting broadband deployment. The Mayor discusses the rollout of cable modem service in Boston as evidence that without local government regulatory requirements, broadband facilities would not reach all residents and businesses within the City.

The Mayor further calls the Commission's attention to the important role that local governments play in managing the public rights-of-way. The fact that local governments facilitate resolution of customer service complaints is in itself an economic subsidy to cable operators. The industry does not need a further subsidy in the form of free use of the public rights-of-way. The Commission has no legal basis for attempting to limit local governments from recovering anything less than fair market value for the special privilege to use and occupy the public rights-of-way. The right to use and occupy the public rights-of-way is a special benefit not enjoyed by the public at-large, and compensation for that use and occupation is thus not a tax.



CITY OF BOSTON MASSACHUSETTS

OFFICE OF THE MAYOR
THOMAS M. MENINO

August 6, 2002

Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street S.W.
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Kathleen Q. Abernathy
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Dear Commissioners:

I write to you today in response to several comments filed in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, Declaratory Order and Notice of Proposed Rulemaking in GN Docket No. 00-185 and CS Docket No. 02-52, FCC 02-77 (rel. March 15, 2002) ("NPRM"). The City of Boston and the United States Conference of Mayors ("USCM") are members of the Alliance of Local Organizations Against Preemption ("ALOAP"), and the City of Boston (the "City") fully supports the comments and reply comments filed by ALOAP in this proceeding. I am, however, writing to you in my capacity as the Mayor of Boston, Massachusetts, the current President of the United States Conference of Mayors, and as a member of the Federal Communications Commission's Local State Government Advisory Committee, to personally express my strong opposition to statements regarding the state of broadband deployment made by AT&T Corp., AOL Time Warner, Inc.,

Cablevision System Corporation, Comcast Corporation, Charter Communications, Inc., the National Cable Telecommunications Association and Verizon in their comments in the aforementioned proceeding.

First and foremost, I want to remind the Commission that the City of Boston has never required cable operators to pay franchise fees on gross revenues received from providing cable modem service via facilities placed in our City's public rights-of-way, even though it was the City's right to do so. In contrast to the disparaging remarks made by AT&T, the City of Boston has never viewed a cable system as "a convenient revenue-producing enterprise." (AT&T Corp. Comments at 45.) But the City has always taken its role as local regulator very seriously. As President Harry S. Truman said: "The Buck Stops Here." Nowhere is this more appropriate than in the case of broadband deployment and customer service.

I am deeply concerned about the adverse impact the Commission's cable modem ruling will have on the availability of cable modem service and other broadband services to all American homes and small businesses. Thanks to years of poor cable customer service, rising cable rates, delayed cable system construction, and sluggish DSL deployment, I am all too well aware of the important role local governments must play in facilitating broadband deployment and of the important role local government regulators have in ensuring that subscriber service complaints are resolved in a timely manner.

Any further action taken by the Commission in this area should be based solely on solid factual evidence and sound legal analysis. It should not be based on unsupported claims made by the cable, telecommunications, and Internet service industries. I hereby submit the facts regarding the deployment of high speed Internet access facilities in Boston as a case study to demonstrate why local franchising authority over broadband deployment should be protected, not eliminated.

WITHOUT LOCAL FRANCHISE AUTHORITY
BROADBAND DEPLOYMENT WILL NOT REACH ALL AMERICANS

Boston currently has two franchised cable operators – AT&T Comcast and RCN – with 750 MHz capacity systems, and an ILEC rolling out Digital Subscriber Line (DSL) service. Yet six of seventeen neighborhoods aren't completely built out by RCN according to its license

agreement. Moreover, at this point neighborhood “completion” means about 80% passed. We find DSL and cable modem services are frequently unavailable, and their areas of unavailability tend to overlap geographically. We believe this is attributable to demand outpacing ILEC and cable infrastructure investment in many neighborhoods.

Boston is going to be served by AT&T Comcast. With 38 million homes passed by AT&T Comcast’s plant, how concerned and responsive will AT&T Comcast be if 10% of Boston’s 282,000 aren’t passed? With 8.2 million customers for voice, video and data, who will make Boston’s 150,000 customers a priority? Without local government authority to regulate deployment of broadband facilities and services – be they designated as cable, information or telecommunications services and facilities – who will protect the Americans left off the broadband information highway?

Cablevision’s contention that there has been rapid deployment of broadband services is simply wrong. (Cablevision Comments at 4.) Verizon has almost no factual basis to support its conclusion that the market for residential and small business broadband services is fully competitive. (Verizon Comments at 1-4.) Charter’s policy argument that deregulation promotes broadband deployment runs counter to the reality of what is happening in America’s communities. (Charter Comments at 14.) AOL Time Warner’s claim that local regulation poses a threat to rapid broadband deployment ignores the fact that local regulation and local franchise authority has played a primary role in *facilitating* the deployment of cable modem service to all neighborhoods within a franchise area. (AOL Time Warner Comments at 7-8.) And NCTA’s belief that there is no role for local governments to play in the regulation of information services is without merit. (NCTA Comments at 43.)

Declaring Cable Modem Service to be Neither a Cable Nor Telecommunications Service, Nor a Service Subject to Franchise Requirements, Is Unlawful and Will Deprive Americans of the Protections Congress Intended to Secure For Them Through Federal, State and Local Authority.

The City of Boston and the USCM join with the National League of Cities, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and the International Municipal Lawyers Association, in endorsing the comments filed by ALOAP. As a matter of law, I fully support the position taken by ALOAP that the Commission has no legal basis to question the authority of local governments to require a

franchise to use and operate facilities within the public rights-of-way. Moreover, the Commission's position that cable modem service is neither a cable or telecommunications service is not supported by federal law. *See* ALOAP Comments at 8-47; *see also City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997).

As a policy matter, I caution the Commission to examine the potentially devastating effect of its decision. As cable service and/or as a service that requires a franchise to use the public rights-of-way, cable modem deployment is subject to local government franchise requirements, especially local requirements to deploy facilities throughout an entire franchise area. As a telecommunications service, cable modem service would be subject to 47 U.S.C. § 202(a) requirements "to furnish such communications service upon reasonable request therefor. . . ." But if it is neither a cable nor telecommunications service, nor subject to franchise requirements, what is to prevent a cable operator from deciding that the profit margins in Boston's North End or Chinatown are just not large enough to provide the economic incentive to deploy cable modem facilities to those areas? AT&T stated in its comments: "Entirely new facilities, systems and capabilities, unnecessary to provide core video programming services, needed to be developed in order to provide cable modem service." (AT&T Corp. Comments at 11.) If the Commission continues to strip local governments of authority to enforce franchise requirements over cable modem service, what action will the Commission take to protect at-risk youth and small business located outside the core downtown areas when cable operators begin deciding not to deploy to every neighborhood "entirely new facilities, systems and capabilities, unnecessary to provide core video programming services"? What response does the Commission believe should be provided to the 35% of Boston residents who call the City to ask: "Why can't I get DSL or cable service?" Local government is the last line of defense to ensure that broadband deployment reaches all Americans.

**Local Government Regulatory Authority Has Been Instrumental
In Facilitating Deployment of Broadband Services to All Americans**

In January 2001, Boston's largest cable franchise was bought by AT&T Broadband. The terms of the cable franchise required AT&T Broadband to upgrade its cable system throughout the City by September 30, 2001. This upgrade would have enabled every household in the City to obtain high speed Internet access. Within one year of acquiring the Boston franchise,

however, AT&T Broadband notified the City in writing that it would not meet the build-out deadlines to which it had agreed, and asked for an additional twelve to eighteen months to build out and upgrade the cable system. The City has held AT&T Broadband to its revised build-out schedule and has recently secured a commitment from the newly formed AT&T Comcast – backed by tougher reporting standards, specific compliance measures, and harsher penalties for non-compliance – to meet definitive completion dates to finish upgrading its cable system to enable all of the City’s residents and businesses to have access to broadband services. Meaningful local franchise authority, including local government authority to require broadband providers to build out their systems to serve *entire* franchise areas, is a necessary and useful means of promoting broadband deployment for all Americans.

Market Forces Alone Have Not Ensured That Broadband Services Reach All Americans

The City of Boston is also served by a competitive cable operator, RCN. In 1999, RCN entered into a fifteen-year cable franchise agreement with the City, under which RCN agreed to build out facilities capable of providing high speed Internet access to 90% of the City within three and one-half years, and to build out the entire City within six years. Two years into the agreement, RCN began to fall behind in its construction schedule. Despite evidence presented by the City that RCN would be unable to meet its build-out requirements, and over the formal opposition of the City, the Commission declared that the Boston was nonetheless subject to effective competition, noting that “RCN intends to build out its system to serve the entire city of Boston, albeit at a slower pace than it originally intended.” *In re Matter of Cablevision of Boston Petition for Determination of Effective Competition Application for Review*, Memorandum Opinion and Order, 17 FCC Rcd. 4772, 4778 ¶ 14 (March 13, 2002). Forty days after the Commission’s effective competition order, RCN notified the City that its 2002 and 2003 budgets would not include new construction dollars for the City and requested “relief from its franchise obligations.” See attached letter from Thomas K. Steel, Jr., to Michael Lynch dated April 22, 2002. At the same time, RCN requested to be certified as an OVS operator for the City of Boston. Open Video Certification Application of RCN BecoCom, LLC (April 18, 2002), available at <http://www.fcc.gov/mb/ovs/csovsccr.html>. The current franchise agreement is the only legal requirement that binds RCN to its promise to build out the entire City. Relying on

market forces alone will leave many Americans without access to the broadband services that are increasingly becoming a necessity of modern life.

**LOCAL GOVERNMENTS HAVE AUTHORITY TO
CHARGE FAIR MARKET VALUE FOR USE OF THE PUBLIC RIGHTS-OF-WAY.**

I am troubled by the Commission's comments in the NPRM that: "We are concerned that State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services." NPRM at ¶ 104. In Boston, nothing could be further from the truth. In Boston, we have long recognized the City's obligation to manage the public rights-of-way in a responsible manner. We have done so through our Board of Street Commissioners and its successor, the Public Improvement Commission ("PIC"). Our PIC members and staff have worked diligently over the last fifteen years to maintain a fair and impartial public right-of-way regulatory structure. The City provides ample means for providers to expedite the right-of-way permitting process. Working with major utility, telecommunications, and cable providers, the City has established fairness in our public right-of-way policies and has successfully preserved our City's infrastructure, while at the same time we have worked with industry to promote safe, efficient, and rapid deployment of facilities.

As I stated above, Boston does not collect franchise fees on gross revenues received from provision of cable modem service, but that was our decision. This decision rests with the local franchising authority, not with the Commission. As more cable providers and telecommunications companies install or upgrade their networks to support cable modem, telephone, and additional services by laying additional fiber, cable and facilities, they make greater use of our local roadways, alleys, sidewalks, and public ways. Underground construction shortens and degrades the public roadway. Excessive overhead cabling and the increased number of appurtenances necessary to deliver cable services over a hybrid fiber coaxial network cause public safety concerns due to pole stress, double-polling, low hanging cable, and other risks.

As custodians of the right-of-way, local government must, on the public's behalf, guard and maintain that land in trust. More importantly, we cannot allow abuse or overuse of the

public rights-of-way for private gain. Use of public land for commercial profit demands a reasonable fee for its use. Failure to require fair market value constitutes a subsidy by local government to the cable and telecommunications providers at the expense of other taxpayers and residents. Federal law preserves local governments authority to obtain fair and reasonable compensation for use of the public rights-of-way, and any attempt by the Commission to preempt this would be unlawful.

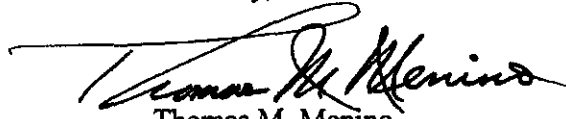
I also draw the Commission's attention to a hidden subsidy local governments are already providing to the cable and telecommunications industries. By providing a local government unit that addresses cable customer, cable modem, and DSL customer complaints, local governments are in effect already providing a valuable subsidy for the cable and telecommunications industries that no other business operating in the City receives. When the City helps resolve customer service complaints, the City helps both cable operators and DSL operators to retain customers and charge more for their services. "[O]verall satisfaction of cable subscribers is more affected by a perceived decline in service quality than by price increases—indicating that operators can afford to 'moderately' raise prices as long as customers think the quality of service is improving." Shirley Brady, *The Bottom Line on Customer Satisfaction*, Cable World, July 15, 2002 (summarizing the American Society for Quality survey of American customer satisfaction). The Commission need not attempt to provide cable and telecommunications operators yet another subsidy by unlawfully attempting to permit them to use the public rights-of-way for free.

Finally, requiring providers that use and occupy the public rights-of-way to pay fair market value in return for the special privilege of a franchise does not constitute a tax. See ALOAP's opening comments, section III.E.6, pp. 56-57. The primary characteristic that distinguishes a rent or a regulatory fee from a tax is that the renter or regulatory fee payer receives a special privilege or benefit. "[T]he essential characteristics of a tax are that it is not a voluntary payment . . . and not as payment for some special privilege granted or service rendered." 84 C.J.S. § 1(b)(1) (1995, Supp. 2000). A taxpayer receives the general benefit of good government, but not a special benefit. Those entities that place facilities in the public rights-of-way, however, receive a special benefit that no other taxpayer receives. Whether the rent received is used for maintenance of the public rights-of-way or to fund general services is irrelevant – what matters is that the person paying right-of-way fees is receiving something in return that a person not paying the fee is not receiving. Nothing stated in any comments

submitted in this proceeding changes the simple fact that local governments require providers to pay right-of-way, telecommunications or cable franchise fees only if that provider places facilities over, above, within, or through the public rights-of-way. Any attempt to preempt local government authority to require fair market value for use of the rights-of-way would amount to nothing less than a FCC-mandated subsidy for cable and telecommunications companies.

In conclusion, I urge the Commission to respect and acknowledge local communities' authority over the use of their public rights-of-way for cable modem service. Preemption of local authority would slow down, not speed up, broadband deployment. Moreover, an attempt to give communications companies forced access to local property without fair market compensation would merely subsidize the companies at the expense of the citizens and taxpayers who own that property.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Menino", written over a horizontal line.

Thomas M. Menino
Mayor of Boston

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April 22, 2002

201 University Avenue
Westwood, MA 02090
(781) 381-2723
Fax (781) 381-2727

Mr. Michael Lynch, Director
Office of Cable Communications
43 Hawkins Street
Boston, MA 02114

Dear Mr. Lynch:

I am writing in response to your request made at the Annual Performance hearing for a summary construction update as to RCN-BecoCom, LLC's ("RCN") progress in the City of Boston to date and our future plans. As I noted at the Hearing, RCN has a substantial network presence and is operating in the three (3) Boston neighborhoods of Brighton, Hyde Park and West Roxbury. In Boston Proper which includes neighborhoods such as Back Bay, Fenway, the West End and Beacon Hill, RCN has made point-to-point connections through presently available conduit pathways to serve over 14,000 addresses in multiple dwelling unit buildings but RCN has not designed, engineered or constructed a network to serve the entire area. In the neighborhood of Dorchester, RCN has built significant miles of aerial plant but not made the necessary, and costly, underground connections to activate the plant.

Through you, the City has asked for a neighborhood list indicating simply whether or not RCN has completed construction related to engineering and design and activated network to serve the neighborhood area. This list is as follows:

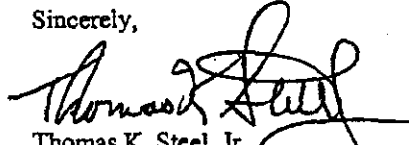
<u>Neighborhood</u>	<u>Activated Network</u>
Brighton	Yes
Allston	No
Charlestown	No
East Boston	No
South Boston	No
Dorchester	No
Mattapan	No
Hyde Park	Yes
West Roxbury	Yes
Roslindale	No
Jamaica Plain	No
Roxbury	No
South End	No
Bay Village	No
Beacon Hill	No
West End	No
North End	No
Boston Proper	No
Fenway	No
Back Bay	No

It is apparent that RCN has fallen short of our construction benchmark targets in the franchise. RCN passes 46,035 addresses out of a total of 265,110 Boston addresses and serves 13,789 subscribers with a combination of network and point-to-point distribution. Of these figures, 16,448 addresses are contained within MDU properties and 7,459 subscribers are located within those MDU properties.

As we discussed at the April 10, 2002 Public Hearing addressing RCN's Annual Performance Review, because of the difficult challenges we face in today's telecom marketplace, RCN has severely constricted its spending on new construction. The RCN budget for 2002 and 2003 does not include new construction dollars for the City of Boston buildout. It is impossible to predict when we may be able to return to anything like a robust construction schedule. For now, RCN will not compete in major parts of the Boston franchise area and it is unlikely that we will be able to so compete within the foreseeable future. Until there is a change in the market for telecommunications capital financing, RCN will not be able to build out its system to serve the entire City of Boston.

In light of these facts, RCN must ask the City for relief in some form from its franchise obligations. Please accept this as a formal request to begin discussions on this matter.

Sincerely,



Thomas K. Steel, Jr.
Vice President and Regulatory Counsel

TKS/dr

